

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 98-3289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**PATRICIA S. MAGYAR, INDIVIDUALLY
AND AS SPECIAL ADMINISTRATOR OF THE
ESTATE OF ANTHONY F. MAGYAR, DECEASED,**

PLAINTIFFS,

**CITY OF MILWAUKEE, A MUNICIPAL
CORPORATION,**

INVOLUNTARY-PLAINTIFF,

V.

**WISCONSIN HEALTH CARE LIABILITY
INSURANCE PLAN, A WISCONSIN INSURANCE
CORPORATION, LAWRENCE J. FRAZIN, M.D.,
NEUROLOGICAL SURGERY, S.C., A WISCONSIN
SERVICE CORPORATION, F/K/A NEUROLOGICAL
SURGERY OF MILWAUKEE, S.C. AND
WISCONSIN PATIENTS COMPENSATION FUND,**

DEFENDANTS,

NEUROLOGICAL SURGERY, S.C.,

**THIRD-PARTY PLAINTIFF-
APPELLANT,**

V.

**PHYSICIANS INSURANCE COMPANY
OF WISCONSIN,**

**THIRD-PARTY DEFENDANT-
RESPONDENT,**

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County:
VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Neurological Surgery, S.C. (NSM),¹ appeals from the circuit court order denying its motion for partial summary judgment, and granting the motion of Physicians Insurance Company of Wisconsin (PIC) to dismiss NSM’s amended third-party complaint. The circuit court concluded that PIC no longer insured NSM for the period during which the underlying medical malpractice claim arose and, therefore, had no duty to defend NSM. NSM argues that its PIC policy still was in effect for the period covering the claim and, therefore, that the circuit court erred in concluding that PIC had no duty to defend. We affirm.

¹ Neurological Surgery, S.C., was formerly known as Neurological Surgery of Milwaukee, S.C. Throughout the trial court proceedings and on appeal, it generally has been referred to as “NSM.”

¶2 This case has a long and complicated history, some of which is recounted in the supreme court's decision in *Magyar v. Wisconsin Health Care Liability Insurance Plan*, 211 Wis. 2d 296, 564 N.W.2d 766 (1997). Because *Magyar* provides the factual background, we need not repeat it here. The issues involved in the previous appeal, however, have little to do with the issues in this appeal.

¶3 Patricia Magyar, the widow of Anthony Magyar, and the estate of Anthony Magyar originally sued Dr. Lawrence J. Frazin, his insurer (Wisconsin Health Care Liability Insurance Plan), and the Wisconsin Patients Compensation Fund, for Dr. Frazin's medical negligence during surgery he performed on Mr. Magyar on December 13, 1990, resulting in Mr. Magyar's death nine days later. Subsequently, the plaintiffs amended their complaint to add NSM, a medical service corporation in which Dr. Frazin was both a shareholder and an employee.

¶4 NSM provided notice of the claim to PIC. NSM did so, however, only after being involved in the litigation for approximately ten months, during which it appeared in its own defense, answered the amended complaint by Dr. Frazin's counsel, and changed counsel twice. PIC denied that it had any policy providing coverage for NSM and, therefore, asserted that it had no duty to defend NSM. Thus, NSM served a third-party complaint against PIC. Ultimately, the circuit court agreed that PIC had no duty to defend, and dismissed NSM's third-party action pursuant to a stipulation characterized by PIC as providing, in part, that "an ultimate verdict or decision must not require a retrial of liability issues"

and that, in the event of a retrial, “NSM agreed to waive the statute of limitations, and the retrial could include NSM as a defendant.”²

¶5 From April 1987 to January 1, 1989, the two physician shareholders of NSM, Dr. Frazin and Dr. Richard H. Strassburger, were individually insured against medical professional liability exposure through claims-made policies with PIC. NSM, as a corporate entity, was similarly insured by PIC, at no additional charge, through a policy that stated: “[Y]our entity is not covered unless all physicians and surgeons who are members of your entity are covered by individual policies of insurance issued by us.” The general rules of the PIC policy for NSM also stated: “A ... corporation is eligible for coverage only if all physician and surgeon members, partners, officers, directors or shareholders of the ... corporation: 1. Are insured by professional liability policies of insurance issued by us. 2. Maintain the same limits of liability.”

¶6 Effective January 1, 1989, PIC did not renew Dr. Frazin’s policy, due to his claims history. As a result, Dr. Frazin would not have been covered, under a PIC policy, for any negligence committed after 12:01 A.M. on January 1, 1989.³ Further, because “all physicians” of NSM were no longer “covered by

² We note that on April 16, 1999, pursuant to Magyar’s request, this court ordered all record items other than 381 through 392, 395 through 399, 443, 444, 447, 449, 452, 455, and 459 returned to the clerk of circuit court to facilitate further proceedings in the matter underlying this appeal. We further note that the parties’ briefs cite many of the records that were not retained by this court. The stipulation is one of the records that was returned to the circuit court; we accept PIC’s undisputed summary of its provisions.

³ Following the nonrenewal of his PIC policy, Dr. Frazin obtained insurance coverage with Wisconsin Health Care Liability Insurance Plan. Dr. Frazin, however, also purchased from PIC a reporting endorsement for his nonrenewed policy. This endorsement provided Dr. Frazin with individual “tail coverage” extending the reporting period for covered incidents that occurred during the period in which the nonrenewed policy had been in effect. Because Mr. Magyar’s death occurred on December 22, 1990, PIC coverage was not available under the reporting endorsement.

individual policies of insurance issued by [PIC],” NSM also would not have been covered, under a PIC policy, for any negligence committed by Dr. Frazin after 12:01 A.M. on January 1, 1989.

¶7 It was undisputed, however, that while PIC notified Dr. Frazin of his policy termination, PIC failed to provide separate notice of Dr. Frazin’s policy termination by nonrenewal, or of NSM’s policy termination, to NSM or to the state commissioner of insurance, as required under WIS. STAT. § 655.24(3)-(4).⁴ It also was undisputed that PIC failed to provide separate notice of Dr. Frazin’s policy termination, or of NSM’s policy termination, to NSM under the terms of its own policy, which basically tracked the statutory requirements.

¶8 The circuit court, therefore, concluded that PIC violated WIS. STAT. § 631.36(4) by failing to notify NSM of the termination of its policy. The court also determined, however, that the violation did not result in coverage for NSM on the Magyar claim because, under § 631.36(4), proper notice would have afforded NSM the opportunity to extend its PIC coverage only to December 31, 1989, which still would have fallen short of the date of Mr. Magyar’s surgery.⁵

⁴ All references to the Wisconsin Statutes are to the 1987-88 version unless otherwise noted. WISCONSIN STAT. § 655.24(3)-(4), in relevant part, provided:

(3) The notice of cancellation or nonrenewal required under sub. (2)(b) must inform the insured that the insured’s license to practice medicine ... may be suspended or not renewed if the licensee has no insurance or insufficient insurance....

(4) The insurer shall, upon termination of a policy of health care liability insurance ... by cancellation or nonrenewal, notify the commissioner [of insurance] of the termination.

⁵ WISCONSIN STAT. § 631.36(4), in relevant part, provided:

NONRENEWAL. (a) *Notice required....* [A] policyholder has a right to have the policy renewed, on the terms then being applied by the insurer to similar risks, for an additional period of

(continued)

¶9 We review a circuit court’s summary judgment determinations *de novo*. See **Green Spring Farms v. Kersten**, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Whether an insurer has a duty to defend depends on the specific facts of the case and terms of the policy. See **C.L. v. School Dist.**, 221 Wis. 2d 692, 699, 585 N.W.2d 826 (Ct. App. 1998) (“When determining whether an insurer has a duty to defend, we must compare the allegations within the four corners of the complaint with the terms of the insurance policy.”). “The construction of words and phrases in insurance policies is generally a matter of law and is controlled by the same rules of construction as are applied to contracts generally.” **Kremers-Urban Co. v. American Employers Ins. Co.**, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). The construction of a statute presents a question of law also subject to *de novo* review. See **Hake v. Zimmerlee**, 178 Wis. 2d 417, 421, 504 N.W.2d 411 (Ct. App. 1993).

¶10 NSM argues that although PIC notified Dr. Frazin of the nonrenewal of his policy, it failed to: (1) notify NSM of Dr. Frazin’s policy termination; (2) notify NSM, or the insurance commissioner, of NSM’s policy termination; and (3) advise Dr. Frazin of the reasons for his policy termination, as required by Wis.

time equivalent to the expiring term if the agreed term is one year or less, or for one year if the agreed term is longer than one year, unless at least 60 days prior to the date of expiration provided in the policy a notice of intention not to renew the policy beyond the agreed expiration date is mailed or delivered to the policyholder

We note that had Dr. Frazin exercised his right to renew his policy under the statute, the renewal period would have been nine months, not one year as the circuit court said, because the term of his terminated PIC policy was nine months. This distinction, however, would have made no difference to the circuit court; it merely would have increased the time period between the termination of Dr. Frazin’s extended PIC policy and the date of Mr. Magyar’s surgery. The distinction also makes no difference in our resolution of this appeal. Additionally, we note that although, in the circuit court, PIC argued that NSM was an insured, not a policyholder, PIC does not make that argument upon appeal.

STAT. § 631.36(6).⁶ For any or all of these reasons, NSM maintains that its PIC policy never terminated and therefore was not subject to the extension limitation of § 631.36(4).

¶11 NSM challenges the circuit court’s rationale. NSM argues that nothing in the statutes or PIC policy prohibits the renewal from continuing for an indefinite number of successive periods, each corresponding to the length of the policy, if PIC never gave the required notice of nonrenewal. NSM contends, “Allowing [PIC] to circumvent WIS. STAT. § 655.24(4) and terminate NSM’s policy without providing such notice would disrupt the legislature’s scheme of financial responsibility in health care.” NSM’s argument finds considerable support, at least by analogy, in *Lang v. Kurtz*, 100 Wis. 2d 40, 301 N.W.2d 262 (Ct. App. 1980).

¶12 In *Lang*, an auto insurer had denied coverage to a defendant who had failed to pay his policy premium. *See id.* at 43. It was undisputed, however, that the insurer had failed to notify the secretary of transportation of the cancellation, as required under WIS. STAT. § 344.34 (1977). *See id.* at 42. We concluded that the insurer’s failure to comply with the notice requirement foreclosed the insurer’s argument that the insured’s policy had lapsed. *See id.* at 43. We also concluded that the terms of the policy, requiring a ten-day written

⁶ WISCONSIN STAT. § 631.36(6) provided:

INFORMATION ABOUT GROUNDS. If a notice of cancellation or nonrenewal under sub. (2)(b) or (4) does not state with reasonable precision the facts on which the insurer’s decision is based, the insurer must mail or deliver that information within 5 working days after receipt of a written request by the policyholder. No such notice is effective unless it contains adequate information about the policyholder’s right to make the request.

advance notice of cancellation, estopped the insurer from asserting that the policy was no longer in effect. *See id.* at 46.

¶13 NSM argues that the *Lang* rationale should apply to the facts of this case. In response, PIC does little more than point out the obvious differences between *Lang* and the instant case. PIC fails, however, to offer any convincing argument that would counter the logical bases for extending the *Lang* rationale to the circumstances here. NSM’s *Lang* theory is compelling. *See also Sausen v. American Family Mut. Ins. Co.*, 121 Wis. 2d 653, 655-56, 360 N.W.2d 565 (Ct. App. 1984) (“We construe sec. 631.36(4)(a) to continue coverage under the existing insurance policy when the insurer fails to give notice of nonrenewal or of premium due.”).

¶14 NSM argues that PIC violated WIS. STAT. § 631.36(6) since “the notices forwarded to Dr. Frazin fail to state with any precision the facts upon which [PIC’s] nonrenewal decision was based.” NSM also argues that PIC violated WIS. STAT. § 655.24(3) by failing to advise Dr. Frazin that his license to practice medicine could be “suspended or nonrenewed if [he had] no insurance or insufficient insurance.” NSM maintains, therefore, that PIC never properly terminated Dr. Frazin’s policy and that, as a result, Dr. Frazin remained individually insured, thus satisfying the prerequisite for the continuation of NSM’s PIC policy. We conclude, however, that although NSM’s argument is theoretically plausible, it falters under the facts of this case.

¶15 PIC’s November 1, 1988 letter informed Dr. Frazin that it was “unable to renew” his policy “due to the claims history of [his] medical practice.” The letter also informed Dr. Frazin that he could utilize “a review process for physicians who feel there are circumstances which may have a favorable impact

on [the nonrenewal] decision.” Dr. Frazin utilized that review process, but PIC still decided not to renew his policy. NSM offers no authority to support its argument that an insured’s “claims history” is an unreasonably imprecise basis for nonrenewal, under WIS. STAT. § 631.36(6).

¶16 Moreover, NSM points to nothing in the record suggesting that Dr. Frazin ever misunderstood that his PIC policy had been terminated. Dr. Frazin was informed of the basis for nonrenewal. If he had any doubts or questions about his “claims history,” presumably he would have raised them in the review process. Further, if Dr. Frazin had wanted to challenge his nonrenewal for failure of PIC to notify the insurance commissioner, or for failure of PIC to inform him of his potential license suspension or nonrenewal, he could have said so, and PIC then would have realized its errors and could have corrected them.

¶17 Instead, after the review process, Dr. Frazin never contended that his termination was invalid. In fact, Dr. Frazin obtained a reporting endorsement from PIC at a cost of almost \$39,000, and obtained a new medical professional liability policy from the Wisconsin Health Care Liability Insurance Plan. Thus, even if Dr. Frazin or NSM eventually realized that he could have challenged the statutory validity of his nonrenewal, Dr. Frazin failed to do so. Clearly, Dr. Frazin understood that his PIC policy had not been renewed. Clearly, Dr. Frazin knew that, other than the reporting endorsement, he no longer had individual PIC coverage.

¶18 An additional factor supports PIC’s position. Not only did Dr. Frazin obtain other insurance from Wisconsin Health Care Liability Insurance Plan following his PIC nonrenewal, but, according to the affidavit of NSM’s bookkeeper, Carol Czaplewski, on February 4, 1993, NSM purchased insurance

from “Wisconsin Health Care Plan, a unit of Wausau Insurance,” after learning that its PIC policy had not been renewed. Citing WIS. STAT. § 631.36(4)(b), PIC argues, “if a policyholder had insured elsewhere, no notice of cancellation or nonrenewal was required at all.” PIC is correct.

¶19 In relevant part, WIS. STAT. § 631.36(4)(b) provided that the nonrenewal notice requirements “do[] not apply if the policyholder has insured elsewhere, has accepted replacement coverage or has requested or agreed to nonrenewal.” The PIC policies were claims-made policies. By March 19, 1993, when the Magyar complaint was amended to add NSM as a defendant—i.e., when the “claim” was “made” against NSM—both Dr. Frazin and NSM had obtained other insurance. Thus, the notice requirements of § 631.36(4) were inapplicable, and any failure of PIC to comply with them was immaterial.⁷

¶20 Additionally, NSM did receive notice of Dr. Frazin’s nonrenewal. As we have explained:

[T]he general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer

⁷ NSM argues, however, that even if the requirements of WIS. STAT. § 631.36(4) were inapplicable by operation of the exception in § 631.36(4)(b), the termination of the Frazin and NSM policies still would have been invalid under WIS. STAT. § 655.24(2)(b) which provided:

[A]ny termination of the policy by cancellation or nonrenewal is not effective as to patients claiming against those covered by the policy unless a written notice complying with sub. (3) and giving the date upon which the termination is to become effective has been received by the insured at least 10 days prior to the taking effect of a cancellation or nonrenewal for nonpayment of premium or for loss of license or certificate of registration and at least 60 days prior to the taking effect of a cancellation or nonrenewal for any other reason.

We reject NSM’s argument. By its terms, § 655.24(2)(b) governed the effectiveness of a policy termination *as to patients* claiming against those covered by the policy. Thus, it protected the patient, not the provider of services to the patient.

or agent receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation

Suburban Motors of Grafton, Inc. v. Forester, 134 Wis.2d 183, 192, 396 N.W.2d 351 (Ct. App. 1986) (citation omitted). Thus, as a matter of law, because Dr. Frazin was an officer of NSM,⁸ his knowledge of his nonrenewal is imputed to NSM. Notwithstanding Dr. Frazin's affidavit stating that he "had no idea that the effect of nonrenewal of [his] policy could be to cause the termination of NSM's corporate coverage," NSM, through Dr. Frazin, received notice that one of its individual physicians no longer had individual PIC coverage. Accordingly, NSM necessarily knew that "all" its physicians no longer had PIC coverage and, therefore, that its PIC policy had terminated.⁹

¶21 Therefore, because Dr. Frazin knew of PIC's nonrenewal of his individual policy, because Dr. Frazin's knowledge is imputed to NSM, because NSM's PIC policy terminated once Dr. Frazin was not individually insured by PIC, and because both Dr. Frazin and NSM had obtained other insurance by the time the Magyar claim was made against NSM, we conclude that PIC had no duty

⁸ In the appendix to its brief to this court, NSM included a copy of a March 14, 1994 letter to counsel for NSM in which counsel for PIC characterized Dr. Frazin as "an officer and agent" of NSM. Our review of the appellate briefs and limited record on appeal reveals no disagreement, on behalf of NSM, with this characterization.

⁹ Additionally, although NSM's rather tardy purchase of other insurance would support its contention that lack of notice of its or Dr. Frazin's nonrenewal left it in the lurch, NSM is hard-pressed to claim complete surprise. As the circuit court observed:

NSM was under a duty to inquire under these circumstances. NSM should have known something was wrong with their [sic] policy when no new declarations pages or endorsements were sent and when the new billing statements did not include NSM as a policy holder, all things which were customary in the past. A reasonable insured would interpret these facts as indications of possible non-renewal. Given[] that NSM did not inquire into the status of its insurance coverage, it is not entitled to four years of renewals.

to defend NSM against the Magyar claim. Accordingly, we affirm the circuit's dismissal of NSM's third-party claim against PIC.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

